Supreme Court, U.S.
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No. 98-1936

In The

# Supreme Court of the United States

ELLIOT S. SHAW,

*Petitioner,*

v.

TIKI SHIVERS, individually and as Conservator for Mary Jacqueline Levitz; ROBERT P. MARSCHALL and ANDREW OSTROW, individually and as attorneys for Tiki Shivers as Conservator; and GARY L. VONHOF and JOHN J. HOY, individually and as State Circuit Court Judges,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

ANDREW A. OSTROW*
LAW OFFICE OF ANDREW A. OSTROW
505 South Flagler Drive
Suite 1001
West Palm Beach, FL 33401
(561) 835-0730

*Counsel for Respondents Tiki Shivers, Robert P. Marschall and Andrew Ostrow*

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## PARTIES TO THE PROCEEDING

While Barbara Norcross should be properly included as a party to the District Court proceeding whose Order Imposing Rule 11 Sanctions Dated and Filed April 13, 1998, is the subject of this review, she was not a party to the appeal of the Order to the Eleventh Circuit Court of Appeals and has no financial interest in the outcome of this proceeding.

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## STATEMENT OF THE CASE

This response has been prepared to address the misstatements of fact and law contained within the Petition, which bear on what issues can properly be reviewed by this Court. Petitioner's Questions Presented concern (i) whether there was sufficient evidence to require the trial court's disqualification; (ii) error by the trial court in invoking the *Rooker-Feldman* doctrine in dismissing the Complaint; and (iii) whether the Rule 11 sanctions imposed by the trial court infringed Petitioner's First Amendment rights. In the exuberance of relating his imaginary detective story, Petitioner neglected to point out that of the three issues listed in his Questions Presented, the first and third were neither presented nor considered by the Eleventh Circuit and the second issue was precluded from consideration by res judicata.

This phase of the litigation began with the dismissal with prejudice of Barbara Norcross' Florida State Court Verified Petition for Appointment of Curator and Notice of Suspicion of Murder. As a result and on her behalf, Petitioner Elliot S. Shaw filed a complaint naming as Defendants Conservator Tiki Shivers, her attorneys Marschall and Ostrow and State Court Judges Vonhoff and Hoy. This Complaint sought relief pursuant to Title 42 U.S.C. §1983, §1985(2) and §1986. Barbara Norcross alleged that by having her Probate Court Petition dismissed and by obtaining an award of attorneys fees, Defendant Tiki Shivers and her attorneys deprived her of her constitutional rights. (Petitioner's Appendix E)

The Norcross Complaint was dismissed with prejudice and judgment was entered in favor of the Respondents/Defendants. The dismissal was predicated on the *Rooker-Feldman* doctrine and the frivolous nature of the constitutional claims. An appeal of the Complaint's dismissal was filed on behalf of Norcross by her attorney, Petitioner Shaw, with the Eleventh Circuit Court of Appeals. Subsequently, Petitioner withdrew as Appellant Norcross' counsel. The Norcross Appeal was dismissed by the Eleventh Circuit for want of prosecution, since no brief or record was ever filed.

The Order Imposing Rule 11 Sanctions was appealed to the Eleventh Circuit by Petitioner but not by Barbara Norcross. Petitioner's brief on appeal presented the following issues for review:

> A. Whether the Court inappropriately dismissed and issued a Final Judgment in Favor of the Defendants by an improper application of the *Rooker-Feldman* doctrine;
>
> B. Whether the Court improperly ordered Rule 11 Sanctions against the Appellant, Elliot S. Shaw, by using the erroneous application of the *Rooker-Feldman* doctrine as a determination of frivolous filing.

The first issue was precluded from further review by the dismissal of the Norcross appeal. No reason to exempt this issue from well established notions of finality was presented to the Appellate Court.

Neither in the Statement of Issues nor in the argument presented to the Eleventh Circuit did Petitioner assert error by the District Court in denying the motion to recuse. Further, the motion to recuse had been filed only

on behalf of Norcross. It was never renewed by Petitioner on his own behalf subsequent to its denial by the District Court. Nor did Petitioner's brief to the Eleventh Circuit state as an issue or argue that Petitioner's First Amendment rights had been infringed.

## REASONS FOR DENYING THE WRIT

The Petitioner wants to continue writing his mystery story. If he cannot do it using the pretext of a lawsuit, then he will settle for a Supreme Court brief as his forum. He should not get this chance because he has failed to present any issues appropriate for review.

Petitioner's brief lists three questions to be presented but only one of these was presented to the Eleventh Circuit and that one – *Rooker-Feldman* error – was precluded from review by virtue of res judicata.

Prior to entering the Rule 11 Sanctions orders, the trial court dismissed Barbara Norcross' Complaint with prejudice. The order of dismissal was based in part on the *Rooker-Feldman* doctrine.[1] Petitioner, as counsel for Norcross, filed an appeal to the Eleventh Circuit, but withdrew as counsel. The appeal was dismissed for lack of prosecution. Therefore, the District Court's order of dismissal and final judgment is res judicata and may no longer be litigated or reviewed. *Federated Department Stores, Inc. v. Moitie*, 449 U.S. 991, 101 S.Ct. 2424 (1981).

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[1] *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1923) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

Petitioner has waived and has failed to preserve any argument that certiorari should be granted to review the trial court's denial of the disqualification motion. Initially, Petitioner had failed in his attempt to manipulate the Southern District's random assignment system. (Petitioner's Appendix H, pp. 58a – 59a) After this deception was discovered, a recusal motion was filed on behalf of Plaintiff Barbara Norcross which attacked the trial judge personally but included no affidavit from Norcross attesting to the trial judge's personal bias or prejudice against her as required by 28 U.S.C. §144. Nor were there grounds for disqualification under 28 U.S.C. §455. That motion was denied contemporaneously with the dismissal of the Norcross Complaint. Petitioner never moved for recusal on his own behalf. There was no appeal by Norcross of the trial judge's denial of the motion.

Since Petitioner never sought the trial judge's disqualification on his own behalf and the matter was not presented as an issue for appeal, certiorari is precluded as the issue was neither pressed nor passed upon by the lower courts. *United States v. Williams*, 504 U.S. 36, 40, 112 S. Ct. 1735, 1739 (1992); *National Collegiate Athletic Association v. Smith*, ___ U. S. ___, 119 S. Ct. 924, 930 (1999). Petitioner's argument that the trial judge lacked impartiality, was substantially prejudiced and biased against Petitioner is being raised for the first time in his petition. The issue has been waived and review should be declined. *Hopkins v. Reeves*, ___ U. S. ___, 118 S. Ct. 1895, 1899 at n. 3 (1998).

Petitioner's third presented question, infringement of First Amendment rights by the imposition of sanctions, is

also being raised for the first time. Petitioner argues that he was merely trying to bring some unnamed killers to justice and that the trial court denied his right to be heard. But a viable lawsuit depends upon a legal case or controversy and not the desire to expose alleged public corruption. The sanctions were awarded pursuant to Rule 11, and not to stifle speech.

Petitioner's constitutional issue, having not been previously presented, could not have been part of the basis for the Eleventh Circuit's affirmance of the trial court. Since the issue has not been considered by the lower courts, review is not warranted. *Holly Farms Corporation v. National Labor Relations Board*, 517 U.S. 392, 400 at n. 7, 116 S. Ct. 1396, 1402 (1996); *Patrick v. Burget*, 486 U.S. 94, 99 at n. 5, 108 S. Ct. 1658, 1662 (1988).

Further, Petitioner provides absolutely no justification to examine whether Rule 11 "transgressed constitutional bounds". Nor does Petitioner suggest that Rule 11's provision for sanctions exceeds the Rule making limitations of the Rules Enabling Act. *Hanna v. Plumer*, 380 U.S. 460, 463, 85 S. Ct. 1136, 1140 (1965). Rather, the proceedings below were a textbook case for exactly what Rule 11 is intended to curtail. Sanctions were imposed because the asserted claims were not warranted under existing law; there was no evidentiary support for any of the factual claims or that an injury was caused to Plaintiff Norcross; failure to adequately conduct a preliminary inquiry as to the legal sufficiency of the lawsuit; the lawsuit was filed improperly to harass the Respondents; lack of legal foundation to the Complaint; and purposeful disobedience of the random filing system. (Petitioner's Appendix B & H) From this record, there can be no

argument that Rule 11 was applied "to chill . . . [Petitioner's] enthusiasm or creativity in pursuing factual or legal theories." *Advisory Committee Notes to 1983 Amendment to Rule 11.* Nothing has been presented to warrant the review of the constitutionality of the rule. *United States v. Albertini*, 472 U.S. 675, 680, 105 S. Ct. 2897, 2902 (1985).

## CONCLUSION

For the reasons given above, the Petition should be denied.

Dated July 28, 1999

Respectfully submitted,

ANDREW A. OSTROW
LAW OFFICE OF ANDREW A. OSTROW*
505 South Flagler Drive
Suite 1001
West Palm Beach, FL 33401
(561) 835-0730

*Counsel for Respondents Tiki Shivers, Robert P. Marschall and Andrew Ostrow*

**Counsel of Record*